

**1441 THEFT — § 943.20(1)(a)****Statutory Definition of the Crime**

Theft, as defined in § 943.20(1)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally (takes and carries away) (uses) (transfers) (conceals) (retains possession of)<sup>1</sup> movable property of another without consent and with intent to deprive the owner permanently of possession of the property.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant intentionally took and carried away movable property of another.<sup>2</sup>

The term “intentionally” means that the defendant must have had the mental purpose to take and carry away property.<sup>3</sup>

“Movable property” means property whose physical location can be changed.<sup>4</sup>

2. The owner of the property did not consent<sup>5</sup> to taking and carrying away the property.
3. The defendant knew that the owner did not consent.<sup>6</sup>
4. The defendant intended to deprive the owner permanently of the possession of the property.



### **Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.<sup>7</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of theft have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION. SEE WIS JI-CRIMINAL 1441B FOR OTHER PENALTY-INCREASING FACTS.<sup>8</sup>

### **[Determining Value]**

[If you find the defendant guilty, answer the following question:

("Was the value of property stolen more than \$100,000?")

Answer: "yes" or "no.")

("Was the value of property stolen more than \$10,000?")

Answer: "yes" or "no.")

("Was the value of property stolen more than \$5,000?")

Answer: "yes" or "no.")



(“Was the value of property stolen more than \$2,500?”

Answer: “yes” or “no.”)

“Value” means the market value of the property at the time of the theft or the replacement cost, whichever is less.<sup>9</sup>

Before you may answer “yes,” you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM THE SAME OWNER “PURSUANT TO A SINGLE INTENT AND DESIGN,” AS PROVIDED IN § 971.36(3)(a).<sup>10</sup>

[In determining the value of the property stolen, you may consider all thefts that you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.].

#### COMMENT

Wis JI-Criminal 1441 was originally published in 1966 and revised in 1977, 1987, 1991, 1999, 2000, 2002, 2003, 2006, 2009, and 2018. This revision was approved by the Committee in February 2022; it updated footnote 10 to reflect a new sub-category pursuant to 2019 Wisconsin Act 144 [effective date: March 5, 2020].

This instruction is for violations of § 943.20(1)(a). The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. See footnote 8, below. This amount was increased to \$2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001, and changed again by 2001 Wisconsin Act 109. The penalty increases to a Class D felony in six situations specified in sub. (3)(d), which are addressed by Wis JI-Criminal 1441B.

For a general discussion of past and current Wisconsin theft statutes, see Melli & Remington, “Theft



A Comparative Analysis,” 1954 Wis. L. Rev. 253; Baldwin, “Criminal Misappropriations in Wisconsin—Part I,” 44 Marq. L. Rev. 253 (1960 61).

See §§ 971.32, 971.33, and 971.36 with respect to pleading, evidence, subsequent prosecutions, and what constitutes “ownership” and “possession” in theft cases. Prosecuting more than one theft as a single crime under § 971.36(3) is addressed in connection with the determination of the value of stolen property in bracketed material at the end of the instruction.

Charging ten counts of theft and five counts of concealing stolen property for taking ten firearms during a burglary and concealing five of them does not violate rules prohibiting multiple charges. State v. Trawitzki, 2001 WI 77, 244 Wis.2d 523, 628 N.W.2d 801. “[T]he theft and concealment of each firearm increases the danger posed to society. Accordingly, it is appropriate to punish the taking and the concealing of each firearm separately.” 2001 WI 77 ¶36.

1. One of the five alternatives in parentheses should be selected. The rest of the instruction is drafted for a case where the act is alleged to be “takes and carries away,” which, in the Committee’s judgment, is the most commonly charged alternative.

In State v. Genova, 77 Wis.2d 141, 252 N.W.2d 380 (1977), the Wisconsin Supreme Court approved the construction of the theft statute adopted in this instruction. A theft charge had been dismissed on the basis that the complaint charged only that the defendant had transferred property and not that he had taken the property and transferred it. The supreme court held that the complaint had been sufficient in charging only “transfer.” The statute should be read as though the following “or” appeared in it: takes and carries away, or uses, or transfers, or conceals, or retains. A violation of the statute need not include a taking from the owner.

2. Define “property of another” if necessary. The term is defined as follows in §§ 939.22(28) and 943.20(2)(c):

939.22(28) “Property of another” means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.

943.20(2)(c) “Property of another” includes property in which the actor is a co owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife.

3. “Intentionally” also is satisfied if the person “is aware that his or her conduct is practically certain to cause [the] result.” In the context of this offense, it is unlikely that the “practically certain” alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

4. This is based on the definition of “movable property” in § 943.20(2)(a) which provides:

(a) “Movable property” is property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights, and things growing on, affixed to or found in land.

Section 943.20(2) defines “property” as follows:



- (b) “Property” means all forms of tangible property, whether real or personal, without limitation including electricity, gas and documents which represent or embody a chose in action or other intangible rights.

5. If definition of “without consent” is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that “without consent” means “no consent in fact” or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. Knowledge that the taking was without consent is required because the definition of this offense begins with the word “intentionally.” Section 939.23(3) provides that the word “intentionally” requires “knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word ‘intentionally’” in the statute.

7. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

8. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established “beyond a reasonable doubt.” The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000 2001 legislative session. The amount making the offense a felony was increased to \$2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

A new category – value exceeding \$100,000 – was added by 2017 Wisconsin Act 287 [effective date: April 18, 2018]. The penalties provided in subs. (3)(a) through (cm) are as follows:

- if the value of the property does not exceed \$2,500, the offense is a Class A misdemeanor;
- if the value of the property exceeds \$2,500 but not \$5,000, the offense is a Class I felony;
- if the value of the property exceeds \$5,000 but not \$10,000, the offense is a Class H felony;
- if the value of the property exceeds \$10,000 but not \$100,000, the offense is a Class G felony;
- and,
- if the value of the property exceeds \$100,000, the offense is a Class F felony.

2007 Wisconsin Act 64 [effective date: March 26, 2008] added the following to § 943.20(2)(d): “If the property stolen is scrap metal, as defined in s. 134.405(1)(f), ‘value’ also includes any costs that would be incurred in repairing or replacing any property damaged in the theft or removal of the scrap metal.”

The questions in the instruction omit the upper limits of the penalty categories; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed \$10,000 but did exceed \$5,000, the two relevant questions could be submitted.



The other facts that increase the penalty to the felony level are addressed in Wis JI-Criminal 1441B.

9. This is the most often used part of the definition of “value” provided in § 943.20(2)(d). The full definition as amended by 2007 Wisconsin Act 64 and 2011 Wisconsin Act 194, reads as follows:

Except as otherwise provided in this paragraph, “value” means the market value at the time of the theft or the cost to the victim of replacing the property within a reasonable time after the theft, whichever is less. If the property stolen is a document evidencing a chose in action or other intangible right, “value” means either the market value of the chose in action or other right or the intrinsic value of the document, whichever is greater. If the property stolen is scrap metal, as defined in s. 134.405(1)(f), or “plastic bulk merchandise container” as defined in s. 134.405(1)(em), “value” also includes any costs that would be incurred in repairing or replacing any property damaged in the theft or removal of the scrap metal or plastic bulk merchandise container. If the thief gave consideration for, or had a legal interest in, the stolen property, the amount of such consideration or value of such interest shall be deducted from the total value of the property.

The Wisconsin Supreme Court in Sartin v. State, 44 Wis.2d 138, 170 N.W.2d 727 (1969), a theft case, refused to adopt either a retail or wholesale value definition of the term “value.” It is felt that in the theft statute, “[t]he statutory scheme clearly contemplates a determination of the cost of replacement to the victim.” Sartin at 149.

10. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime under certain circumstances:

- (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
  - (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.
  - (b) The property belonged to the same owner and was stolen by a person in possession of it.  
or
  - (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
  - (d) If the property is mail, as defined in § 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a).

The material in the instruction addresses the situation defined in subsec. (3)(a): more than one theft from the same owner, pursuant to a single intent and design. There is no Wisconsin case law interpreting this aspect of § 971.36. But the Committee’s conclusion that it may be dealt with most effectively as part of the value question is supported by the case law on related issues, as described below.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles



(valued at more than \$500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as \$180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than \$500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony “was in effect a decision on the grade of the offense, which is clearly an issue only for the jury.” (81 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal.App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis.2d 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to “the grade of the offense.” This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction for the offense can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to “any property,” the jury should find the defendant guilty. Then, in determining value, the jury is instructed to “consider all thefts you are satisfied beyond a reasonable doubt were from the same owner and committed by the defendant pursuant to a single intent and design.”